STATE OF CALIFORNIA PETE WILSON, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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San Francisco, CA 94105

ADDRESS REPLY TO:
P.O. Box 420603
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July 17, 1996

James R. Hussey, President
Marina Mechanical
23188 Foley Street
Hayward, CA 94545-1689

Re: Public Works Case #96-008
Metal Roofing Replacement Job for the Water Treatment Plant Rehabilitation, City of Vacaville

Dear Mr. Hussey:

This letter constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-referenced project under the public works laws, and is made pursuant to Title 8, California Code of Regulations (Cal.CodeRegs.) section 16001(a). Based upon a review of the documents submitted and the applicable statutes and regulations, I have determined that the installation of a replacement metal roof at the Water Treatment Plant Rehabilitation Project, City of Vacaville, by the Marina Mechanical Company ("Marina") is a public work subject to the requirement to pay prevailing wages.[1]

Labor Code section 1720(a)[2] generally defines "public works" to mean: "[C]onstruction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds. . . ." Further, the obligation to pay prevailing wages is statutory and not based solely on a construction contract. Lusardi Construction Company v. Aubry (1992) 1 Cal.4th 976, 988-989, 4 Cal.Rptr.2d 837, 842-844.

In this case, Esky Benavidez Corporation ("Benavidez"), the general contractor, with a guarantee by the bonding company, Safeco Insurance Company of America ("Safeco"), has paid directly for the replacement metal roof, because the City of Vacaville ("City") refused to accept the project as complete when it found the initial roof work (done by Benavidez itself with the help of a consultant on its payroll) to be unsatisfactory. The City exercised its right under the contract[3] (Part 4, Sections 4.01-4.12) with Benavidez to have the roof the City paid for meet the design specifications and quality of workmanship required by the contract. Benavidez decided to have Marina replace the roof for it to meet the contract specifications.

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[1] Because the initial contract work constituted construction, was performed under contract and was paid for out of public funds, it was properly deemed a public works under Labor Code section 1720(a).

[2] All subsequent references to code sections are to the Labor Code unless otherwise indicated.

[3] Article III of the contract between the City and Benavidez requires the payment of prevailing wages.

Benavidez paid Marina for the work and pledged its assets to Safeco as part of the agreement to guarantee the payment. The City never accepted the initial roof work, and to date has not accepted the project as complete, so the repair work undertaken by Marina was part of the initial public works project.[4]

The question posed by your coverage request is whether the money paid by Benavidez to Marina constitutes public funds and if so, why? First, payment by a general contractor to a subcontractor under a contract for public work requires the payment of prevailing wages because the general contractor, under its contract with the City and by statute,[5] is required to pay prevailing wages to all workers employed on the public work. The fact that the general contractor unsuccessfully attempted to do the work itself first does not vitiate this requirement. This is so because section 1720 specifically includes repair work[6] in its definition of public work and there is no doubt in this case that the repair work was undertaken on behalf of the City because it did not deem the initial work satisfactory. The fact that Benavidez failed to do the work satisfactorily the first time goes only to its profit or loss on the project and not to whether the work was paid for with public funds requiring the payment of prevailing wages. Therefore, any payment by Benavidez to any subcontractor for work performed on the public work requires the payment of prevailing wages to all workers employed in the execution of the contract for public work.

Second, while it appears from the information provided during the investigation preceding this coverage determination that Safeco did not make any initial payment for the repair work, if it were to have to pay any money in the future as surety for a public work, it has bound itself to the same extent as Benavidez because the surety bond must be read in conjunction with the terms of the construction contract for which it is given and the terms of the bond are read to be coextensive with the terms of the contract. Gordy v. United Pacific Insurance Group (1966) 243 Cal.App.2d 445, 448, 52 Cal.Rptr. 438.[7] Further, the payment and performance surety bonds issued by Safeco on behalf of Benavidez are specifically given for the benefit of all persons who provide labor or materials on the public

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[4] This interpretation is consistent with section 1774 which states: "[t]he contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract."

[5] Section 1771 states in relevant part "[e]xcept for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works."

[6] The terms of section 1720, "construction, alteration, demolition, or repair," are broadly defined. See, e.g., Priest v. City of Oxnard (1969) 275 Cal.App.2d 751, 80 Cal.Rptr. 145.

[7] This interpretation of the liability of the surety bond is of very long standing. See McCormick Saeltzer Co. v. Haidlen (1931) 119 Cal.App. 96, 99-100.

work. Union Asphalt, Inc. v. Planet Insurance Company (1994) 21 Cal.App.4th 1762, 1765-66, 27 Cal.Rptr.2d 371.[8] Therefore, any payment by Safeco carries with it the requirement to pay prevailing wages to all workers employed in the execution of the contract for public work.

There is a dispute between Benavidez and Marina as to whether Marina was informed of the prevailing wage obligations Marina, as a subcontractor, had under the prevailing wage law. This dispute is not an issue to be resolved in this coverage determination, but is best left to be resolved in any enforcement action by the Division of Labor Standard Enforcement, as to any penalties or wages claims Benavidez and Marina may be required to pay, or in any breach of contract or indemnity action between Benavidez and Marina. See Lusardi Construction Company v. Aubry (1992) 1 Cal.4th 976, 996-98, 4 Cal.Rptr.2d 837, 849-51.

Sincerely,

Lloyd W. Aubry, Jr.
Director

cc: John Duncan, Chief Deputy Director
Roberta Mendonca, Labor Commissioner
Nance Steffen, Assistant Chief, DLSE
Dorothy Vuksich, Chief, DLSR
Rulon Cottrell, Chief, DAS
Vanessa L. Holton, Assistant Chief Counsel
Alan Levinson, Deputy Labor Commissioner
Shelly Martin, City of Vacaville
Esky Benavidez, Esky Benavidez Corporation

[8] See also Gordy, supra, at 447.